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# THE CRIMINAL CODE OF ILLINOIS OF 1961

HOWARD NEWCOMB MORSE

THE Illinois General Assembly in 1961 replaced the Criminal Code of 1874, as amended. This new Code contains many new concepts which have not been defined or elucidated by the courts. The purpose of this article is to present a detailed and analytical treatment, both explanatory and expository, of the more salient features of the new Code, and to anticipate and speculate *in re* future judicial construction thereof.

Section 1-2 states that "[t]he provisions of this Code shall be construed in accordance with the general purposes hereof, to: . . . (c) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders." This section must be read in *pari materia* with the constitutional provision that "[a]ll penalties shall be proportioned to the nature of the offense."<sup>1</sup>

There are two theories under which the courts may proceed in considering the consequences of the reference in the new statutory section to "recognition of differences in rehabilitation possibilities" as a criterion in prescribing penalties. One theory is to compare the new statutory section and the organic provision to an oral statement and a written instrument, respectively, and, by analogy to the parol evidence rule, analyze the affect of the new statutory section on the constitutional provision as one of amplification and explanation. The other theory is to apply the maxim of *expressio unius est exclusio alterius* to the organic provision at the expense of the new statutory section. The first theory is preferable, as it is consistent with Francis Wharton's theory of punishment<sup>2</sup> and its application has always had an ameliorating and salutary effect upon the dispensing of criminal justice.

<sup>1</sup> ILL. CONST. art. II, § 11. Unless otherwise indicated, all sections within the text are to the Criminal Code, ILL. REV. STAT. ch. 38.

<sup>2</sup> 1 WHARTON, A TREATISE ON CRIMINAL LAW § 13 (8th ed. 1888).

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Section 1-3 states that "No conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State." The purport of the last seven words is both remindful and cautionary. Any statute is a criminal statute if it provides a term of imprisonment or a fine, or if it uses the terms "felony" or "misdemeanor," and criminal statutes are not relegated exclusively to the Criminal Code.

Section 3-1, in stating "no person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt," represents the first statutory affirmation in Illinois history of this ancient bench law. In a relatively small minority of Illinois decisions concerning the degree of the *onus probandi* in criminal cases, the phrase "to a moral certainty" has been employed<sup>3</sup> rather than, or in addition to, the phrase "beyond a reasonable doubt." A legalistic difference has been suggested for the two phrases.<sup>4</sup> However, two cases,<sup>5</sup> albeit civil cases arising in other jurisdictions, considered the issue directly, and they resolved the matter by concluding that the two phrases have the same legal meaning. In view of the reference to "beyond a reasonable doubt" exclusively in section 3-1, "to a moral certainty" should not, and probably will not, be used in the future by the Supreme Court of Illinois.

Section 3-2 states that

"affirmative defense" means that unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon. If the issue involved in an affirmative defense is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.

The word "some" means that the defendant, to raise the issue involving the alleged defense, must adduce evidence thereon sufficient to raise a reasonable doubt.<sup>6</sup> The state need not initially negative an exception which withdraws certain acts or persons from the operation

<sup>3</sup> *People v. Vozel*, 346 Ill. 209, 178 N.E. 473 (1931); *People v. Christocakos*, 357 Ill. 599, 192 N.E. 677 (1934); *People v. Hooper*, 364 Ill. 320, 4 N.E.2d 490 (1936); *People v. Borulinski*, 383 Ill. 608, 50 N.E.2d 716 (1943).

<sup>4</sup> Letter from Jay Schiller to the Editor, 36 CHI. BAR REC. 380 (1955). At the time this letter was written by Mr. Schiller, he was serving as an Assistant State's Attorney of Cook County, Illinois.

<sup>5</sup> *Fidelity Mutual Life Assoc. v. Mettler*, 185 U.S. 308, 317 (1902); *Williams v. Blue Ridge Building and Loan Assoc.*, 207 N.C. 362, 364, 177 S.E. 2d 176, 177 (1934).

<sup>6</sup> See *People v. Durand*, 307 Ill. 611, 139 N.E.2d 78 (1923), which treated this concept under the old Code.

of a criminal statute. For the defendant to plead such an exception is to invoke an affirmative defense or the equivalent thereof from an evidentiary standpoint. Once the defendant contributes "some" evidence to the effect that he or the criminal act which he is alleged to have committed comes within the exception, the state must prove his guilt by negating the exception as well as his guilt as to all other elements of the alleged criminal offense beyond a reasonable doubt. The maximum effect of an "affirmative defense" is to enable the defendant to impose upon the state responsibility for an additional element which would not otherwise constitute a component of the state's case. Examples of exceptions which the state must negative once the defendant introduces "some" evidence as to the applicability of such exception are found in sections 22-44,<sup>7</sup> 24-2(e),<sup>8</sup> 104-2(c), and chapter 121½, section 137.15. Section 22-44 and chapter 121½, section 137.15, refer to the defendant having the "burden of proving" insofar as coming within the exception is concerned. These two phrases represent very unfortunate language. What is incumbent upon the defendant is to offer "some" evidence, not to discharge a burden of proof.

It would be impossible to ascertain if the defendant fulfilled the burden of proof unless the burden of proof shifted from the state to him or unless a separate trial or hearing was held to determine the one issue as to whether the defendant was guilty beyond a reasonable doubt. The burden of proof never shifts from the state to the defendant in a criminal prosecution, for if it did even as to one point, the presumption of innocence would be inferentially destroyed, and the defendant would be put in the position of having to prove his innocence as to such point beyond a reasonable doubt. There would be no reason to hold a separate trial or hearing to determine whether the defendant comes within the exception as the question of the applicability of the exception goes to the issue of the guilt of the defendant.

Section 104-2(c) refers to the "burden of going forward with evidence," not to the "burden of proving." The wording of section 104-2(c) represents a distinct improvement in verbiage. However, the word "duty" would have been preferable to the word "burden." The "burden of going forward with evidence" means the duty of

<sup>7</sup> See *People v. Williams*, 23 Ill. 2d 549, 179 N.E.2d 639 (1962).

<sup>8</sup> See *People v. Saltis*, 328 Ill. 494, 160 N.E. 86 (1928), which treated this concept under the old Code.

going forward with "some" evidence. In respect to section 104-2(c), once the defendant pleads that he comes within the exception represented by article 104 of the Code of Criminal Procedure and produces "some" evidence thereof, then the state must prove by a preponderance of evidence that the defendant does not come within the exception. The degree of proof of the burden of proof of the state is reduced from "beyond a reasonable doubt" past "clear and convincing evidence" all the way to a "preponderance of evidence"<sup>9</sup> because a separate hearing is held, with or without a special jury as the case may be,<sup>10</sup> to determine, not guilt at the time of the crime, but competency at the time of the trial.

Section 66-1, of course, raises the age of the conclusive presumption of incapacity of an infant to commit a crime from ten to thirteen years, with the effect that henceforth a young criminal such as Howard Lang,<sup>11</sup> aged twelve, will escape the toils of the law. The section states: "No person shall be convicted of any offense unless he had attained his thirteenth birthday at the time the offense was committed." The word "convicted" was substituted for the phrase "found guilty" in old section 591. Technically, in neither case was any part of the cause of action or all of the right of action by the state against an infant below the specified age abolished. However, from a pragmatic point of view, enough of the right of action was abolished so as to protect the infant below the stipulated age from punishment, and effectively to deter the state from prosecuting him. Even more importantly, section 6-1, read in *pari materia* with section 35-1, seems to indicate that the rebuttable presumption of incapacity of an infant to commit a crime between the ages of ten and fourteen years has not merely been narrowed to between the ages of thirteen and fourteen years, but has been abrogated altogether. Former section 590 contained the only mention of the age of fourteen years as to general criminal responsibility, in the sense of presuming a "sound mind." Former section 589 made a "sound mind" a condition precedent to the formation of an "intention." And former section 588 provided that an "intention" was an essential element of a "criminal offense," except in cases involving "criminal negligence." Another line of reasoning which militates against the view that the rebuttable presumption

<sup>9</sup> *People v. Reck*, 392 Ill. 311, 64 N.E.2d 526 (1946).

<sup>10</sup> ILL. REV. STAT. ch. 38, § 104-2 (a) (b).

<sup>11</sup> *People v. Lang*, 402 Ill. 170, 83 N.E.2d 688 (1949).

of incapacity of an infant to commit a crime has been narrowed to between thirteen and fourteen years was well expressed as follows:

Legislation which operates to revise the entire subject to which it relates, by its very comprehensiveness gives strong implication of a legislative intent not only to repeal former statutory law upon the subject, but also to supersede the common law relating to the same subject. Therefore, the failure to set out former statutory provisions in a later comprehensive enactment will operate to repeal the omitted provisions which are inconsistent, and former provisions which are not repugnant to the later legislation as well.<sup>12</sup>

An additional reason supporting the position that the rebuttable presumption of incapacity of an infant to commit a crime has been abolished *in toto* is the fact that there are no corresponding delict presumptions in Illinois law. If there were, the existence of a rebuttable presumption of incapacity of an infant to commit a tort possibly could be said to be indicative of a standard insofar as wrongs committed by infants are concerned.

Legal insanity in Illinois is governed by the following forty-six words of section 6-2(a): "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." The phrase "mental disease or mental defect" was lifted from the case of *Durham v. United States*.<sup>13</sup> The term "mental disease" in turn was taken from *State v. Pike*.<sup>14</sup> However, the 1843 *M'Naghten* case<sup>15</sup> contained the phrase "defect of reason from disease of the mind." The word "result" was substituted for the word "product" used in both the *Pike* and *Durham* cases.

The primary, or so-called *M'Naghten*, test of legal insanity is if the man who committed the crime does not know the difference between right and wrong (the counterparts of good and evil in the canonical law) as to a particular act constituting a crime at the time of its commission. Jerome Hall urged that the word "know" as used in the *M'Naghten* test be given "a wider definition so that it means the kind of knowing that is relevant, i.e., realization or *appreciation* of the wrongness of seriously harming a human being," or the wrongness of any other individual act constituting a specific offense. The

<sup>12</sup> 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2018 (3rd ed. 1943).

<sup>13</sup> 214 F.2d 862, 875 (D.C. Cir. 1954).

<sup>14</sup> 49 N. H. 399 (1869).

<sup>15</sup> 10 Clark & Fennelly 200, 8 Eng. Rep. 718 (1843).

<sup>16</sup> HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 520 (2d ed. 1960).

word "appreciate" was employed instead of the word "know." Ascribing the foregoing legal inflection to the word "know" and then equating that word with the word "appreciate" would have the effect of broadening the *M'Naghten* test with the result that a defendant in a criminal prosecution would be considered legally insane if he was not capable of "conceptual thinking" at the time he committed the individual act constituting the specific offense. Differentiating between right and wrong in the abstract is compatible with "conceptual thinking," but distinguishing between right and wrong as to the particular act constituting the crime is conterminous with "concrete thinking."<sup>17</sup> The *M'Naghten* test has never been directed to the difference between right and wrong in the abstract, but instead always to the difference between right and wrong as to the individual act constituting the specific offense.

Vermont, in 1957, adopted a definition of legal insanity<sup>18</sup> almost identical to that which Illinois adopted four years later. However, the 1957 Vermont statute goes on to say "[t]he *M'Naghten* [*sic*] test of insanity in criminal cases is hereby abolished." The last statement is not entirely true, as the *M'Naghten* test was abolished by this definition of legal insanity only as an independent test. It exists as the primary test in reciprocal dependency with another test (the superimposed secondary test).

The word "conform" was decided upon rather than the word "choose," and as a consequence the phrase "to conform his conduct to the requirements of law" was substituted for such phrases enunciated by the Supreme Court of Illinois as "of choosing between them"<sup>19</sup> (right and wrong), "to choose either to do or not to do the act, and of controlling his conduct in accordance with such choice,"<sup>20</sup> "of making intelligent choice in respect thereto,"<sup>21</sup> or "to choose to do or not to do the act constituting the crime."<sup>22</sup> The inability to choose to do right by refraining from choosing to do wrong as to the particular act constituting the crime at the time of its commission, or the inability to carry out the choice to do right after choosing to do right

<sup>17</sup> *People v. Wolff*, 40 Cal. Rptr. 271, 276, 394 P.2d 959, 964 (1964).

<sup>18</sup> V.T. STAT. ANN. tit. 13, § 4801 (1957).

<sup>19</sup> *Hopps v. People*, 31 Ill. 385, 392 (1863).

<sup>20</sup> *Dunn v. People*, 109 Ill. 635, 644 (1884).

<sup>21</sup> *Dacey v. People*, 116 Ill. 555, 586 (1886).

<sup>22</sup> *Hornish v. People*, 142 Ill. 620, 625, 32 N.E. 677, 678 (1892).

by refraining from choosing to do wrong as to the particular act constituting the crime at the time of its commission, known as the "uncontrollable impulse" or "irresistible impulse" rule, is the alternative test of legal insanity.

In Illinois, legal insanity was gauged by whether the man who committed a crime knew the difference between right and wrong as to the particular act constituting the crime at the time of its commission. In Illinois, the alternative test of legal insanity was if the man who committed a crime knew the difference between right and wrong as to the particular act constituting the crime at the time of its commission, but was unable to choose to do right by refraining from choosing to do wrong as to the particular act constituting the crime at the time of its commission, or was unable to execute the choice to do right after choosing to do right by refraining from choosing to do wrong as to the particular act constituting the crime at the time of its commission.

The importance of the new statutory definition of legal insanity in Illinois lies in the superimposing upon the primary test or the alternative test "mental disease or mental defect" as a secondary test. This secondary test superimposed upon the primary test means that lack of knowledge of the difference between right and wrong as to the particular act constituting the crime at the time of its commission must be the result of a "mental disease or mental defect" and not due to some other cause, or attributable to some other source, such as, for example, complete or almost complete ignorance of moral values so as to constitute amorality or inculcation in the wrong set of moral values. The secondary test superimposed upon the alternative test means that inability to choose to do right and to carry out such choice by refraining from choosing to do wrong and from executing such choice as to the particular act constituting the crime at the time of its commission, even though possessed of knowledge of the difference between right and wrong as to the particular act constituting the crime at the time of its commission, must be the result of a "mental disease or mental defect" and not due to some other cause or attributable to some other source. The so-called *Durham* test was adopted in New Hampshire and the District of Columbia by case law; Maine adopted it by statute. The best diminutive definition of the *Durham* test is contained in the 1963 Maine statute and reads as follows: "An accused is not criminally responsible if his unlawful act was the product of mental disease or



mental defect."<sup>23</sup> By her new definition of legal insanity, Illinois has adopted the *Durham* test, not as an independent test for legal insanity, but rather as the superincumbent secondary test existing only in mutual dependency with one or the other of the basic tests (the primary or the alternative test).

The foregoing analysis of insanity of course refers to legal insanity, as contradistinguished from medical insanity. In order to better understand insanity, it is necessary to compare it with criminal incompetency and what is meant by sexually dangerous persons, even though the latter two conditions are provided for in the Code of Criminal Procedure rather than in the Criminal Code. In this respect, the author is treating of a "bridge concept," that is, a generic doctrine that pervades both new Illinois codes in the criminal area.

The most important aspects in which insanity differs from the criminal incompetency delineated in the Code of Criminal Procedure are as follows: insanity represents a more drastic, a more severe, condition than criminal incompetency; insanity represents a fairly general condition whereas criminal incompetency represents a fairly specific condition; insanity represents a mental condition exclusively whereas criminal incompetency may represent either a mental or a physical condition. The tests of criminal incompetency, unlike the foregoing tests of insanity, are inability on the part of a person charged with an offense to understand the nature and purpose of the proceedings against him, inability on the part of a person charged with an offense to assist in his defense or inability on the part of a person, after a death sentence has been imposed, to understand the nature and purpose of such sentence; and the time period with which insanity is associated is the time of the commission of the crime, whereas the time periods to which criminal incompetency is related are before trial, during trial, after a judgment has been entered but before pronouncement of sentence, or after a death sentence has been imposed but before execution of that sentence.

If the court has reason to believe, but does not necessarily believe, that the defendant is criminally incompetent, a criminal incompetency hearing *must* be ordered by the court *sua sponte* or in response to the raising of the issue of criminal incompetency in the same manner in which an affirmative defense is raised. Whether the defendant is thought to be criminally mentally incompetent or criminally physically in-

<sup>23</sup> ME. REV. STAT. ANN. ch. 149, § 17-B (1964).

competent, the test or tests under which the defendant is thought to be criminally incompetent should always be specified. However, the public prosecutor, as well as the defense counsel, may raise the issue of criminal incompetency by filing a petition to that effect, although usually when such an issue is raised it is filed, as would be expected, by the latter. It would be ironical for the prosecution to raise the issue of criminal incompetency based upon the second test, since the prosecution is not in a position to have knowledge of this comparable to the defense counsel. Also, even though the issue of criminal incompetency is raised, the additional element of criminal competency is not automatically cast upon the state to prove, because the court is not obliged to order a criminal incompetency hearing unless the court has reason to believe that the defendant is criminally incompetent, and of this the court is the sole and final arbiter. The Tentative Final Draft provided that the "burden of proving"<sup>24</sup> was on the party requesting determination of criminal incompetency. The phraseology of this provision was changed for the better to the "burden of going forward with evidence."<sup>25</sup> "Duty" would have been a preferable word to "burden." At this point, the absurdity of the provision authorizing the state to raise the issue of criminal incompetency becomes apparent, for if the state raises the issue by entering a plea and buttresses such plea with "some" evidence, which must be more than a scintilla but may be less than half of the totality of the evidence submitted, and if the court finds that it has reason to believe that the defendant is criminally incompetent, then the state would be in the anomalous position of having to refute and disprove, in all likelihood, at least part of its own evidence as to the criminal incompetency of the defendant in order to prove by a preponderance of evidence that the defendant is criminally competent. The Tentative Final Draft<sup>26</sup> also provided that, if the court has reason to believe that the defendant was criminally incompetent during the trial, at which it was mandatory for the court to order a criminal incompetency hearing, it was discretionary with the court as to whether such hearing should be a jury hearing or a bench hearing. This provision was changed<sup>27</sup> so that, like a sexually dangerous person trial under article 105 of the Code of Criminal Procedure, a jury is impanelled only if the defendant or the respondent asks for it. Under article 104

<sup>24</sup> ILL. CODE OF CRIM. PROC., p. 30 (Tent. Final Draft § 40-2(c), 1963).

<sup>25</sup> ILL. CODE OF CRIM. PROC., ILL. REV. STAT. ch. 38, § 104-2(c) (1963).

<sup>26</sup> *Supra* note 24 at 29.

<sup>27</sup> ILL. REV. STAT. ch. 38, § 105-5 (1963).

of that code the jury is deemed to be a special one since there already is a petit jury. In addition, under article 105 of the same code, the proceeding is designated a trial as well as a hearing, because once the charge of a criminal offense is instituted, the filing of the petition prevents any trial in respect to such charge and gives rise to only one proceeding, that of the sexually dangerous person trial. The proceeding under article 104 is exclusively termed a hearing, because there is a jury trial or a bench trial as to the issue of guilt, and the proceeding as to the issue of criminal incompetency is in addition thereto. However, in respect to the other three time periods, a special jury hearing is mandatory unless the special jury is waived by the defendant. A special jury is mandatory, unless waived by the defendant, in a criminal incompetency hearing in Alabama, Georgia, Idaho, Kentucky, Louisiana, Missouri, Montana, New Mexico, Oklahoma, and South Dakota.

The burden of proof is incumbent upon the state to prove the criminal competency<sup>28</sup> of the defendant by a preponderance of evidence<sup>29</sup> because a criminal incompetency hearing is a civil proceeding governed by civil rules of evidence. The court may appoint experts, to be compensated by the county, to examine the defendant with or without his consent. Any statements made by the defendant during such examination, and any ostensible evidence discovered as a result of such statements, would be inadmissible. The criminal proceedings and the statute of limitations as to the alleged crime are tolled during a criminal incompetency hearing.

If the court orders a criminal incompetency hearing during the criminal trial, the court must "suspend," not terminate, the criminal trial, meaning that the petit jury in all probability would be locked up while the criminal incompetency hearing proceeds and until it is concluded. If the defendant is found to be criminally competent at the hearing, the criminal trial will be "resumed," not started anew. If the defendant is found to be criminally incompetent at the hearing, the criminal trial will be terminated but the statute of limitations as to the crime with which he was charged will remain tolled.

If the defendant is found to be criminally physically incompetent, he remains subject to order or call of court, and in the interim may be free on bail or recognizance. If the defendant is found to be criminally mentally incompetent, he is committed to the Department of Mental

<sup>28</sup> *People v. Bender*, 20 Ill. 2d 45, 169 N.E.2d 328 (1960).

<sup>29</sup> *People v. Reck*, 392 Ill. 311, 64 N.E. 2d 526 (1946).

Health and confined in either a public or private mental hospital, if a public mental facility, probably the Security Hospital at Chester, Illinois. Conditions which could cause or constitute criminal mental incompetency are amnesia, feeble-mindedness, epilepsy, and a monomania, particularly in reference to a subject not germane to the crime of which the defendant is accused. Unlike article 105, under which only the committing court can conduct a recovery hearing, article 104 authorizes a recovery hearing in either the committing county or the county in which the person is confined. If the person is adjudged to be recovered the criminal prosecution shall be reactivated, and if such person is found guilty and sentenced to imprisonment the time during which he was confined as the result of his commitment shall be credited against his sentence. To try a criminally incompetent defendant for an offense would be analogous to trying a defendant for a criminal offense *in absentia*.

Differing from both legal insanity and criminal incompetency is the condition constituting a "sexually dangerous person," as provided for in article 105 of the Code of Criminal Procedure. Section 105-1.01 states as follows:

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

This section represented a 1955 amendment<sup>30</sup> to a 1938 statute,<sup>31</sup> which contained the phrase "and not insane or feeble-minded" after the phrase "all persons suffering from a mental disorder." The presumption in which we must indulge is that the legislative omission of the phrase "and not insane or feeble-minded" was *ex industria*.<sup>32</sup> Therefore, since the 1955 amendment, a sexually dangerous person is not necessarily legally sane and thus could be legally insane. However, we must also presume against a general duplication being intended by the legislature insofar as the 1955 amendment and section 6-2(a) are concerned.

Just as a monomania pertinent to the crime of which the defendant is accused may constitute legal insanity and a monomania not relevant

<sup>30</sup> Ill. Laws 1955, at 1144.

<sup>31</sup> Ill. Laws 1938, 1st Sp. Sess., at 28.

<sup>32</sup> See Morse, *A Study in the Significance of Constitutional Word-Omission Ex Industria*, 37 Ky. L.J. 78 (1948).

to the crime of which the defendant is accused cannot constitute legal insanity but may constitute criminal mental incompetency, so the monomania of criminal sexual psychopathy (designated "a mental disorder" in section 105-1.01), existing in conjunction with at least two crimes which are sexual in nature and are directed against children, is the only monomania which may constitute legal insanity but which nevertheless may be dealt with elsewhere than under section 6-2(a) (namely, under article 105 of the Code of Criminal Procedure) and raised as an issue by designated public prosecuting authorities (Attorney General or State's Attorney) rather than by the defendant.

The definition of a sexually dangerous person contains three components: "a mental disorder" (the monomania of criminal sexual psychopathy, one particular medical form of such monomania, for example, being pedophilia), "criminal propensities to the commission of sex offenses," and "demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children."

In regard to the phrase "acts of sexual assault or acts of sexual molestation of children," the reference to children applies to "acts of sexual assault" as well as to "acts of sexual molestation." This interpretation is reinforced by section 825(f), which refers exclusively to children and which since its enactment in 1957, has been in *pari materia* with the sexually dangerous persons statute. In relation to the second component, "sex offenses" in general will not suffice insofar as the applicability of article 105 is concerned as "the commission of sex offenses" is not required; all that is required is "criminal propensities to the commission of sex offenses."

In respect to the third component, the phrases "sexual assault" and "sexual molestation" are not the names of any specific sex offenses in either the old or the new Criminal Code. Within article 11 of the new Code the three specific offenses of indecent liberties with a child,<sup>33</sup> contributing to the sexual delinquency of a child<sup>34</sup> and indecent solicitation of a child<sup>35</sup> constitute both "sexual assault," because the victim is under the statutory age—16, 18 and 13 years, respectively—and is, therefore, legally incapable of effecting consent, and "sexual molestation."

The gravamen word "propensity" denotes a disposition, a proclivity, a pattern; one would have to commit at least two acts of sexual

<sup>33</sup> ILL. CRIM. CODE, ILL. REV. STAT. ch. 38, § 11-4 (1961).

<sup>34</sup> *Supra* at § 11-5.

<sup>35</sup> *Supra* at § 11-6.

assault, two acts of sexual molestation or one act of sexual assault and one act of sexual molestation on separate occasions in order to come within the application of article 105. The use of the phrase "coupled with" preceding the phrase "criminal propensities to the commission of sex offenses" in conjunction with the use of the word "and" following the last-mentioned phrase seems to mean, in reference to the preceding requirement of at least one year's duration immediately prior to the filing of the petition for the monomania of criminal sexual psychopathy ("a mental disorder"), that at least two acts of one or both of the two proscribed types of acts must have occurred during the same time period.

Only the Attorney General or the State's Attorney may file the petition. The two public authorities are mentioned in this order probably so as to camouflage the reason for the designating of two public officials instead of one, that of holding intervention by the Attorney General as a threat over the State's Attorney should the latter be remiss in not filing the petition in an excessive number of obvious cases (possibly effective, however, only if the two are of different political affiliation). The requirement that the respondent must be charged with a criminal offense before the petition may be filed envisions any specific offense of any type whatsoever.

Once the petition and the report by two qualified psychiatrists of at least five years' standing are filed, the trial will be held. A jury will be impaneled only if the respondent asks for it. At the trial, evidence of all prior crimes of whatever nature committed by the respondent is admissible. The trial is a civil proceeding subject to civil rules of evidence.

If the respondent is found to be a sexually dangerous person, the court shall appoint the Director of Public Safety as his guardian. The Department of Mental Health must examine the patient if requested to do so by the Department of Public Safety. The Director of Public Safety may place the patient in the Psychiatric Division of the Illinois State Penitentiary at Menard, Illinois, or, with the consent of its Director, in the care and treatment of the Department of Mental Health.

The application alleging that the patient has fully recovered may be filed by any party in interest but only in the committing court. The disposition of the application may result in continued detention, conditional release (if the court finds it impossible to determine with certainty under conditions of institutional care that the patient has fully

recovered) or absolute discharge. A patient conditionally released might be described as a "parolee-outpatient." With the view of obtaining the absolute discharge of a conditionally-released patient, the application alleging full recovery may be filed by any interested party in the committing court. If any of the terms prescribed as to conditional release are violated by the patient, the court *must* revoke such conditional release and re-commit the patient, and no hearing as to such revocation is required. An absolute discharge effects the quashing of *every* outstanding information and indictment, the basis of which was the reason for the detention. The last provision, in suggesting that the detention may be predicated upon more than one indictment, seems inconsistent with the earlier provision to the effect that in otherwise correct circumstances, the petition may be filed by the proper public officer only when the "person is charged with *a* criminal offense." Obviously, if two charges were brought and the public prosecutor filed the petition after the second charge was instituted, it was the second, and not the first, charge which prompted him to act and, therefore, the detention could be related to only the second charge. Only the charge which provoked the public prosecutor into filing the petition could be considered the causative agency.

The second type of petition which may allege only partial recovery may be filed in the committing court only by the Director of Public Safety, and its disposition may result in only continued detention or conditional release, with the same provision governing as to the effect of a violation of the terms prescribed for such conditional releases. While a patient is out on conditional release as a result of such action, any interested party, including the Director of Public Safety, may file a recovery application. If a patient, after receiving an absolute discharge, commits an act of sexual assault or molestation against a child, the preliminary requirements for the application of article 105 of the Code of Criminal Procedure must be commenced anew. The defendant cannot be recommitted, but has to be criminally prosecuted.

The not inconsiderable legal significance accorded a motor vehicle in Illinois perhaps is best illustrated by the fact that the larceny of a motor vehicle was made a felony irrespective of its value. The surest way for a householder to prevent a thief from making off with his motorcar would be for him to shoot the thief. However, section 7-3 provides that the householder would be "justified in the use of force

which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of forcible felony." The theft of an automobile, however, is not a forcible felony in section 2-8.

While Colorado,<sup>36</sup> Georgia<sup>37</sup> and Nevada<sup>38</sup> have three distinct legal types of murder, Illinois, under the old Criminal Code, had as many as four distinct legal types, for, in addition to the general murder statute<sup>39</sup> declaratory of the crime of murder at common law, the felony-murder rule under the "prosecution of a felonious intent" clause of the involuntary manslaughter proviso<sup>40</sup> and the "naturally tends to destroy the life of human being" clause in the same involuntary manslaughter proviso,<sup>41</sup> there was also the 1923 poisonous liquor statute.<sup>42</sup> Unquestionably, one of the principal innovations of the new Criminal Code is the reduction of the number of the distinct legal types of murder to the traditional first two, both of which are embodied in section 9-1.

Section 9-3, of course, dispensed with the "naturally tends to destroy the life of a human being" clause in the old "involuntary manslaughter proviso." The "naturally tends to destroy the life of a human being" clause in the "proviso" had great potential value in Illinois law but its value was never realized except in the *Goldvarg* case,<sup>43</sup> and that decision did not definitely tell us what that clause of the "proviso" meant, even though a similar "proviso" clause has been widely used to good advantage in Georgia law.<sup>44</sup>

Sections 11-4 and 11-10 omit the gravamen-words "lascivious" and "licentiously," respectively. Section 11-4 includes the concept of statutory rape within the crime of indecent liberties, yet it transfers the

<sup>36</sup> General murder statute: COL. REV. STAT. ANN. § 40-2-1 (1953); felony-murder rule: COL. REV. STAT. ANN. §§ 40-2-3, 40-2-7 (1953); involuntary manslaughter proviso: COL. REV. STAT. ANN. § 40-2-7 (1953).

<sup>37</sup> General murder statute: GA. CODE ANN. § 26-1002 (1964); felony-murder rule: GA. CODE ANN. § 26-1009 (1964); involuntary manslaughter proviso: GA. CODE ANN. § 26-1009 (1964).

<sup>38</sup> General murder statute: NEV. REV. STAT. § 200.010 (1963); felony-murder rule: NEV. REV. STAT. § 200.070 (1963); involuntary manslaughter proviso: NEV. REV. STAT. § 200.070 (1963).

<sup>39</sup> ILL. REV. STAT. ch. 38, § 358 (1959). This statute was repealed by the Criminal Code of 1961.

<sup>40</sup> *Supra* at 363.

<sup>42</sup> *Supra* note 39 at 373 (a).

<sup>41</sup> *Ibid.*

<sup>43</sup> *People v. Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931).

<sup>44</sup> Morse, *The Involuntary Manslaughter Proviso in Georgia*, 12 GA. BAR J. 285 (1950).



former statutory rape age of the victim of sixteen years to indecent liberties, the age for which was formerly fifteen years.

The inconsistencies of the new Illinois Criminal Code are pronounced. While section 11-7 makes adultery stricter by including sexual intercourse as well as cohabitation, thus terminating the effect of the *Miner* case,<sup>45</sup> which held that a single act, or even a number of acts, of illicit intercourse does not constitute adultery, section 11-4(b) makes indecent liberties "liberal" by offering three new defenses to bigamy, and section 11-11, by omission, exempts uncles and nieces, nephews and aunts, grandfathers and granddaughters, grandsons and grandmothers, and first cousins from the crime of incest.

Section 11-16 refers to pandering for money and section 11-19 mentions money or other property in connection with pimping. The question arises as to whether "or other property" is included by necessary implication in the pandering statute since that statute and the pimping statute are cognate laws, and the construction of one may involve the interpolation of both. However, also relevant are the rudimentary rules in respect to the strict interpretation which should be afforded penal statutes and the following admonition by the New York Court of Appeals: "It is a strong thing so to read into a statute words which are not there and, in the absence of a clear necessity, it is a wrong thing to do."<sup>46</sup>

Section 11-20, which deals with obscenity, defines obscenity in terms of prurient and then proceeds to define "prurient." With this type of definitive legislation, if the courts should rule that prurient lacks adequate legal content, the obscenity statute would fall. In New York, after the Supreme Court of the United States held in the *Commercial Pictures Corporation* case<sup>47</sup> that the word "immoral" in the film-licensing section of the Education Law<sup>48</sup> was not susceptible of sufficiently precise legal meaning, the legislature amended the pertinent section<sup>49</sup> in April of 1954 so as to define "immoral." But the Supreme Court, in the *Kingsley* case,<sup>50</sup> struck down the amended provision for substantially

<sup>45</sup> *Miner v. People*, 58 Ill. 59 (1871).

<sup>46</sup> *Palmer v. Spaulding*, 299 N.Y. 368, 372, 87 N.E.2d 301, 303 (1949).

<sup>47</sup> *Commercial Pictures Corp. v. Regents of University of State of New York*, 346 U.S. 587 (1954).

<sup>48</sup> N.Y. EDUC. LAW § 122.

<sup>49</sup> N.Y. EDUC. LAW § 122-a.

<sup>50</sup> *Kingsley International Pictures Corp. v. Regents of University of State of New York*, 360 U.S. 684 (1959).

the same reason. The meaning accorded "immoral" by the New York legislature was a narrowly-restricted one, making "immoral" almost synonymous with "prurient." However, the basis for a certain degree of confidence that our new obscenity statute will survive the rigors of judicial probing is the fact that "immoral" is a word of breadth and depth of meaning while the converse is true of "prurient."

The "predominant appeal" test established by section 11-20 for determining obscenity is analogous to the "dominant element" test<sup>51</sup> applied for determining gaming in many jurisdictions. If the "dominant element" rule should be invalidated in other jurisdictions, the reasoning employed to accomplish such result might be used with equal force by our courts to render inoperative the predominant appeal rule. The principal possible ground for attack probably would be the contention of impossibility or extreme hardship of theoretical or pragmatic ad-measurement. Apparently the converse of the predominant appeal and dominant element tests is the "in part" dependency upon skill test established in section 28-2(a) for determining a "gaming device." "In part" does not mean a minimum, modicum or scintilla but means, according to the Illinois Supreme Court in the *One Mechanical Device* case,<sup>52</sup> "some," possibly considerable or substantial, although servient or subservient.

Section 12-4(b)(3)(4) constitutes the foremost example in the new Criminal Code of reference by implication. Section 13-1, which treats of civil rights, contains the leading example in the new Code of *ejusdem generis*. The concluding phrase "and all other places of public accommodation and amusement" in paragraph (a) probably is broad enough to cover, for example, ambulances and hospitals, billiard parlors and bowling alleys, respectively.

In section 16-1 the word "theft" was employed instead of the word "larceny" because of the inclusion of the concept of embezzlement, and correspondingly, the word "obtain" was used rather than the word "take." Statutory recognition of the larger meaning of "obtain" is consistent with the decision of that highly-vaunted court of last resort of criminal jurisdiction, the Court of Criminal Appeals of Texas, in the *Allen* case.<sup>53</sup> At first glance, section 16-1(c) might appear to be unduly

<sup>51</sup> Morse, The Dominant Element Rule, 58 DICK. L. REV. 394 (1954).

<sup>52</sup> *People v. One Mechanical Device* 11 Ill. 2d 151, 157, 142 N.E. 2d 98, 101 (1957).

<sup>53</sup> *Allen v. State*, 97 Tex. Cr. 467-469, 262 S.W. 502, 503 (1924).

similar to section 18-1(a), which deals with robbery. However, upon analysis the following differences become apparent: the word "obtains" is employed in regard to theft whereas the word "takes" is used in reference to robbery; any one of the eleven types of threats established in section 15-5 might be referred to in regard to theft while only the first type of threat is referred to in reference to robbery; control over the property is referred to in regard to theft whereas the property itself is referred to in reference to robbery; control over the property may be obtained away from the person or presence of the victim of theft while the property must be taken from the person or presence of the victim of robbery; and the owner is referred to as the victim of theft but not of robbery. It is incongruous that robbery and armed robbery, included within sections 18-1 and 18-2, respectively, are considered as "Offenses Directed Against Property," particularly in view of the fact that robbery is listed as a forcible felony in section 2-8 and the fact that a forcible felony is defined as involving "the use or threat of physical force or violence against any individual." This incongruity can be explained as follows: The Criminal Code of Louisiana of 1942 classified armed robbery<sup>54</sup> and simple robbery<sup>55</sup> under "Offenses Against Property." The Criminal Code of Wisconsin of 1955, which is based largely on the Louisiana Criminal Code, classifies robbery<sup>56</sup> under "Crimes Against Property," even though the Wisconsin Statutes of 1953 had classified robbery<sup>57</sup> under "Offenses Against Lives and Persons." Our Code in turn is based largely on the Louisiana and Wisconsin Criminal Codes. Probably the Wisconsin legislature inadvertently followed the Louisiana classification of robbery and our legislature followed suit insofar as the Louisiana-Wisconsin classification in this respect is concerned.

Section 19-1 made no legal changes whatsoever in regard to burglary. All the new statute does is eliminate such old-fashioned designations as "malt-house," "stilling-house" and "meetinghouse." The words "house trailer" were added to the new burglary statute. However, house trailer was included in the word "office" (when a house trailer is used as an office) in the old statute under the implied law of

<sup>54</sup> LA. REV. STAT. ANN. § 14:64 (1950).

<sup>55</sup> *Supra* at § 14:65.

<sup>56</sup> WIS. STAT. ANN. § 943.32 (1958).

<sup>57</sup> WIS. STAT. §§ 340.39, 340.43 (1953).

the *Parsons* case.<sup>58</sup> The Arizona burglary statute<sup>59</sup> also contained the word "office" but not the word "trailer" until its 1951 amendment.<sup>60</sup> More importantly, house trailer was included in the gravamen-phrase "dwelling house" in the old statute under the implied law of the North Carolina federal case of *Evans v. Hughes*,<sup>61</sup> which, although a civil case, contained wordage of sufficient scope to cover the concept of burglary in relation to a house trailer. The word "aircraft" also was added to the new burglary statute. However, the phrase "or other building" in the old statute included aircraft under *ejusdem generis*, especially since the statute contained the phrases "wharfboat, steamboat, or other water craft" and "freight or passenger railroad car."

Section 27-1(a) established a tendency "to provoke a breach of the peace" as the gravamen of criminal defamation. This gravamen existed, not in the old libel statute (section 402), but in the old Group Libel Act (section 471).

Section 27-2, as was the former section, is totally ineffective, since justification for alleged defamation was arrogated to the Constitution of Illinois.<sup>62</sup> But whereas the former section merely repeated wordage of the constitutional provision, the new statute changed "published" to "communicated" and "sufficient" to "affirmative." "Communicated" is a broader term than "published" as it more clearly indicates the oral as well as the written. And "affirmative," although not so strong a word as "sufficient," was used in order to be consistent with its use elsewhere in the Code as authorized by section 3-2, and because it was used in preference to "sufficient" by the Supreme Court of Illinois in the criminal defamation cases of *People v. Fuller*<sup>63</sup> and *People v. Strauch*.<sup>64</sup> However, altering in statutory form verbiage contained in the Constitution is a presumptuous excursion in futility.

Section 28-2(a), which excepted from the definition of a gaming device

a coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof

<sup>58</sup> *State v. Parsons*, 70 Ariz. 399, 402-403, 222 P.2d 637, 639-640 (1950).

<sup>59</sup> ARIZ. CODE ANN. ch. 43, § 9-1 (1939).

<sup>60</sup> Ariz. Laws 1951, at 364, 365.

<sup>61</sup> 135 F. Supp. 555, 557 (M.D.N.C. 1955).

<sup>62</sup> ILL. CONST. art. II, § 4.

<sup>63</sup> 238 Ill. 116, 136, 87 N.E. 336, 342 (1909).

<sup>64</sup> 247 Ill. 220, 233, 93 N.E. 126, 132 (1910).

depend in part upon the skill of the player and which returns to the player thereof no coins, tokens, or merchandise . . .

is a prime example in the new Code of exclusionary legislation. The foregoing exception was adopted by the legislature in 1953.<sup>65</sup>

Section 28-8 raised the minimum recoverable amount of a gambling loss from ten to fifty dollars and no longer required that half of a treble recovery by a member of the public go to the county upon the loser's failing to bring an action for six months.

While the reasoning behind section 33-2 requiring a public officer, public employee or juror to report a bribe under penalty of committing a crime for failure to do so is not easy to appreciate, it nevertheless is easier to appreciate than section 29-3, a similar provision requiring professional and amateur athletes to become informers, as the latter persons, unlike the former, are not clothed with a public capacity.

Section 31-8 proscribes refusing or knowingly failing reasonably upon command to aid a person known to be a peace officer if he is apprehending a criminal or preventing the commission of a crime. Thus, a law enforcement officer's command to a person to render aid makes of such person an involuntary good samaritan under penalty of being guilty of the commission of a misdemeanor. Perhaps it would have been wiser to have made disobedience of the officer's command a felony, as is the case in Colorado.<sup>66</sup> This section brings to mind the other "involuntary good samaritan" concept in Illinois statutory law, the 1935 act requiring the driver of any vehicle involved in an accident to

render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.<sup>67</sup>

Section 31-8, in order to be fully understood, must be considered in conjunction with section 107-8 of the Code of Criminal Procedure. Section 107-8 refers only to the apprehension or arrest situation (section 31-8 uses the word "apprehend" and section 107-8 uses the word "arrest"), limiting the arrest to a lawful one and restricting those persons whom a peace officer may command to come to his assistance to

<sup>65</sup> Ill. Laws 1953, § 2, at 930.

<sup>66</sup> COL. REV. STAT. ANN. § 40-7-20 (1953).

<sup>67</sup> ILL. REV. STAT. ch. 95½, § 135 (1963).

male persons over the age of eighteen. Section 107-8 affords the same authority to the person commanded to aid a law enforcement officer as that possessed by the officer and extends civil immunity to such person as to any reasonable conduct in aid of the officer. The offense (the word "offense" is used in section 31-8 but not in section 107-8) for which a person is apprehended (under section 31-8) or arrested (under section 107-8) may be the violation of a criminal municipal ordinance under section 107-8 according to section 102-15 but not so under section 31-8 according to section 2-12.

Hence, it is evident that the Illinois Criminal Code of 1961 contains many incongruities and anomalies which will have to be corrected by the legislature. It is the hope of the author that this exposition and explanation of certain key provisions will aid in an understanding of the meaning and effect of the 1961 Criminal Code.